NATIONAL LAND FINANCE CO-OPERATIVE SOCIETY LTD. v. SHARIDAL SDN. BHD.

[F.C. (Salleh Abas C.J. (Malaya) Abdul Hamid & George Seah F.JJ.) February 8 & May 16, 1983.)

[Kuala Lumpur – Federal Court Civil Appeal No. 97 of 1982]

Contract – Contract relating to sale of land – Condition that sale should be approved by the Foreign Investment Committee – Approval not given – Suggestion that sale be to joint venture company of which at least 30% of its equity is held by Bumiputra – Contingent condition – Whether agreement became void – Whether requirement of approval a promissory condition – Civil Law Act, 1956, s. 15(2) – Contracts Act, 1950, s. 33.

Practice & Procedure – Action for declaration that agreement for sale became void – Whether should have been commenced by writ – Issue one of construction of agreement – Procedure of originating summons correct.

In this case the respondents had agreed to sell and the appellants had agreed to buy certain immoveable property. It was a condition of the agreement that the sale should be subject to the approval of the Foreign Investment Committee. In the event the Foreign Investment Committee refused its approval but suggested that the property be transferred to a joint venture company of which at least 30% of its equity is held by Bumiputras. The respondents contended that the agreement became void when the Foreign Investment Committee refused to approve the sale, while the appellants maintained that the agreement did not become void but still subsisted because there was a conditional approval. The learned trial judge held that the agreement became void and he made a number of consequential orders. The appellants appealed.

Held: (1) the agreement became void because of the refusal of Foreign Investment Committee to approve the sale over which neither the appellants nor the respondents had control and therefore the various consequential orders made by the learned trial judge were valid;

(2) Whether it is held that the requirement as to approval is a contingent condition or as a mere promissory condition the result would not be different. In the first case there was no agreement to enforce until the requirement was satisfied and the deposit was returnable under the provision of the agreement itself as there was no ground for withholding it any longer; whereas in the second case although there was a subsisting contract it was however defeated or frustrated by a supervening event, which is non-fulfilment of the requirement and in this case also the deposit was refundable as money had and received for the use of the appellants who had paid it.

Cases referred to

(1) *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.* [1952] 2 K.B. 297, 304.
(2) *Property and Bloodstock Ltd.* v. *Emerton; Bush* v. *Property and Bloodstock Ltd.* [1967] 3 All E.R. 321, 330.
(3) *Aberfolyle Plantations Ltd.* v. *Khaw Bian Cheng* [1960] M.L.J. 47.

HIGH COURT.

Raja Abdul Aziz Addruse for the plaintiff.
S. Periasamy for the defendant.

Cur. Adv. Vult.

Wan Hamzah J.: The Plaintiff was the registered owner of land lot No. 176, section 7, Town of Petaling Jaya, together with the building erected thereon known as Sharidal Complex. On September 19, 1980 the Plaintiff entered into an agreement with the Defendant whereby it was agreed that the Plaintiff should sell the property to the Defendant at the price of $8,500,000, of which a sum of $850,000 was paid at the time of the execution of the agreement. It was agreed, *inter alia*, that the Defendant or its solicitor shall make an application to the Foreign Investment Committee (F.I.C.) for approval of the sale and purchase. Clause 3(i) of the agreement reads –

> "The Purchaser shall complete the purchase within 14 days after obtaining the approval from the F.I.C. as aforesaid or within three months after the date of application to the F.I.C. as aforesaid pursuant to clause 3 hereof, whichever is the later, by paying to the Vendor's solicitor ... the balance of the purchase price amounting to $7,650,000 ..."

The words "whichever is the later" in that clause do not make sense. They would make sense if they read "whichever is the earlier", and in that event the result would be more favourable to the Plaintiff as would be seen later from the facts of this case. At the hearing of this case Counsel for the Plaintiff did not insist on the words being read as "whichever is the earlier" but was content to treat the clause as if the words "or within three months after the date of application to the F.I.C. as aforesaid pursuant to clause 3 hereof, whichever is the later" were omitted from the clause.

It is provided in the agreement that time wherever mentioned therein shall be the essence of the agreement.

By letter dated November 28, 1980 on behalf of the Defendant its solicitors applied to the F.I.C. for approval of the sale and purchase. By letter dated April 30, 1981 the F.I.C.'s Secretary replied to the Defendant's solicitors, and paragraph 2 of the letter of reply reads –

> "I am directed to inform you that the F.I.C. is not agreeable to the transaction to proceed as proposed. However, the F.I.C. has no objection to the purchase of Sharidal Complex by National Land Finance Co-operative Society Ltd. from Sharidal Sdn. Bhd. being undertaken on condition National Land Finance Co-operative Society Ltd. incorporates a joint-venture company with bumiputra holding at least 30% of the company's equity to own

the property, and NLFC obtaining the approval of the Director-General of Co-operative Development."

On May 6, 1981 the Plaintiff's solicitors wrote to Defendant's solicitors a letter and stated *inter alia* –

"We have now been handed a copy of a letter dated April 30, 1981 from the F.I.C. ... stating that the F.I.C. is not agreeable to the transaction to proceed as proposed. We trust you would agree that the intended sale could no longer be proceeded with. Our instructions are to inform you our client is now terminating the sale agreement dated September 19, 1980 in accordance with clause 2(b) of the said agreement ..."

By letter dated May 22, 1981 the Defendant appealed to the F.I.C. to exempt the Defendant from the policy of the F.I.C. and to allow the Defendant without any condition to buy the property. The F.I.C. sent a reply dated July 8, 1981 dismissing the appeal and stating as follows:–

"Pembelian harta tersebut hendaklah dilakukan oleh sebuah syarikat usahasama yang mempunyai sekurang-kurangnya 30% penyertaan equiti bumiputra, dan Syarikat Bekerjasama Kebangsaan Pemodalan Tanah Bhd. mestilah juga mendapat kebenaran dari Ketua Pengarah Pembangunan Koperasi mengenai pembelian itu."

By letter dated July 20, 1981 from the Defendant's solicitors to the Plaintiff's solicitors a cheque for the balance of the purchase price was sent. It is stated in this letter as follows:–

"Our clients maintain and reiterate that the said Agreement is still subsisting valid and binding and that your clients are obliged to complete the sale of the abovementioned property so as to cause our clients or their nominees to be registered as owners of the abovementioned property free from encumbrances in accordance with the said Agreement. Our clients instruct us that in view of the approval given by the Foreign Investment Committee (by letter dated April 30, 1981 and further letter dated July 8, 1981) our clients have decided that the abovementioned property be registered not directly in their name but in the name of another entity (i.e. as their nominees) so as to abide by and implement the terms of approval of the Foreign Investment Committee."

By letter dated July 23, 1981 the Plaintiff's solicitors returned the cheque to the Defendant's solicitors. By another letter dated July 27, 1981 the Plaintiff's solicitors informed the Defendant's solicitors that the deposit of $850,000 was deemed to have been forfeited under the agreement.

By this originating summons the Plaintiff prays for –

(1) a declaration that the agreement dated September 19, 1980 became void on April 30, 1981 when the F.I.C. did not agree to approve the sale as proposed unless the Defendant complied with a condition imposed by the F.I.C.;

(2) alternatively, even if the conditional approval given by the F.I.C. as aforesaid constituted approval contemplated under the agreement, a declaration that the Plaintiff is discharged from its liability under the agreement by reason of the Defendant's failure to complete the agreement within 14 days of the said approval having been obtained.

For the Defendant it was contended that the letter from the F.I.C. dated April 30, 1981 conveyed a conditional approval which enables the agreement to be performed, and that although it was provided in the agreement that time shall be the essence, this provision had been waived by the conduct of the Plaintiff and time had thus ceased to be the essence.

In my judgment, in as much as at the time of the F.I.C.'s reply dated April 30, 1981 there was no arrangement for a joint-venture company with bumiputra holding at least 30% of its equity to own the property, the F.I.C.'s letter of April 30, 1981 was a rejection of the Defendant's application for approval of the sale and purchase. Even if the F.I.C.'s letter of April 30, 1981 should be treated as conveying a conditional approval, the Defendant had failed to complete the purchase within 14 days of obtaining the conditional approval. The latest date for the completion should be May 14, 1981. In my judgment there was no waiver on the part of the Plaintiff of the provision requiring payment of the balance of the purchase price to be paid within 14 days of the approval to complete the purchase. It is true that by letter dated December 12, 1980 the Plaintiff requested the Defendant for the release of a sum of $500,000 out of the balance of the price pending decision of the F.I.C. and this sum was paid to the Plaintiff's solicitors on December 17, 1980. But this was not a waiver of the completion of the sale within the 14 days. It was not a consent by the Plaintiff for payment of any part of the balance of the price to be delayed. On the contrary the payment of the $500,000 was made in advance of the time stipulated in the agreement.

The Defendant planned to comply with the condition imposed by the F.I.C. by forming a company in which Bumiputra together with itself would subscribe to the equity. It appears that the Defendant intended to assign its rights under

the sale and purchase agreement to this new company or to appoint the new company as its nominee and to have the property registered in the nominee's name. The first step which the Defendant took towards this direction was to send the letter KRS 41 to the Registrar of Societies to enquire whether the proposed name of the new company (Nalfri Realties Sdn. Bhd.) was available for registration. But this letter dated July 9, 1981 was written well after the expiry of the time when the purchase should have been completed. As late as November 1981 the Defendant had still not obtained Bumiputra participation. On November 25, 1981 the Defendant wrote to MOCCIS (a Bumiputra co-operative society) offering 30% equity in the new company.

It was further submitted on behalf of the Defendant that the date of conditional approval which should be taken into account is not the date of the F.I.C.'s first reply, i.e. April 30, 1981 but the date of the F.I.C.'s second reply, i.e. July 8, 1981 and therefore the period of 14 days for payment of the balance of the price should expire on July 23, 1981 and since the payment of the balance was made on July 20, 1981 it was made in proper time. In my opinion it is absurd to make such suggestion. If the Defendant was allowed to appeal to the F.I.C. at any time, even several months after the first reply, or to appeal repeatedly to the F.I.C., then there would not be any certainty as to what the date of conditional approval would eventually be, and this would frustrate the provision in the agreement for time being the essence. Besides, even if July 8, 1981 was taken as the date of the conditional approval, as at July 23, 1981 the Defendant was still unable to comply with the condition.

For the Defendant it was contended that this originating summons is misconceived, irregular, inapplicable and inappropriate on the ground that there are the following issues which should be tried:—

(a) Whether there was delay on the part of the Defendant to apply to the F.I.C.

(b) Whether A. Tharmalingam & Co. was an agent of the Plaintiff or of the Defendant.

(c) Whether the Plaintiff had rendered all possible assistance in connection with the Defendant's application to the F.I.C.

(d) Whether from early stage the Plaintiff was not keen to get the sale and purchase completed.

(e) Whether the parties intend to negotiate fresh terms of agreement.

As to item (a) above, it is not the Plaintiff's ground of claim that the Defendant had delayed in making application to the F.I.C. The Plaintiff makes clear in the summons that it relies on the following two alternative grounds only for its claim:—

(i) the F.I.C. had rejected the Defendant's application for approval of the sale and purchase, or

(ii) if the F.I.C. had not rejected but given a conditional approval, the Defendant had failed to complete the sale within the time limit fixed in the agreement.

As to item (b), I do not see any connection between the matter of agency with the Plaintiff's two alternative grounds. As to item (c), the F.I.C.'s decision was based on its policy, and this fact was recognised by the Defendant vide the letter KRS 29 of its Chairman appealing against the F.I.C.'s decision. I do not see how the Plaintiff could render assistance so as to change the F.I.C.'s policy or to affect its decision in any way. In any case the Managing Director of the Plaintiff has affirmed in his affidavit that all possible assistance had been rendered by the Plaintiff, and the Defendant has not given any indication as to what form of assistance the Plaintiff had failed to give. As to item (d), even if the Defendant succeeded in showing that the Plaintiff was all along not keen to get the sale and purchase completed, similarly I do not see how the alleged lack of enthusiasm on the part of the Plaintiff could in any way affect the decision of the F.I.C. which, as already pointed out, was based on its policy. The true deciding factor in this case was the F.I.C.'s decision, whether its decision was in the form of rejection or conditional approval, and in the event of a conditional approval the other deciding factor was the Defendant's ability or inability to comply with the F.I.C.'s condition within the time limit. Even if the alleged lack of keenness on the part of the Plaintiff was true, the Defendant has not given any indication how the lack of keeness on the part of the Plaintiff can affect the Defendant's ability or inability to comply with the condition and to complete the purchase in due time. As to item (e), this is also irrelevant. It would have been relevant if it was alleged that the parties had agreed to fresh terms to vary the agreement. There is no such suggestion.

I find that the true issues in this case can be determined on consideration of the various agreed documents which had been produced, together with the undisputed facts which have been disclosed, and there are no issues which require evidence to be called at a trial. Therefore the procedure adopted by the Plaintiff by way of this originating summons is appropriate and the Defendant is not prejudiced thereby.

I grant order declaring that the agreement dated September 19, 1980 became void when the F.I.C. on April 30, 1981 disapproved the sale and purchase. I also make consequential orders in terms and prayers 3, 4 and 5 in the summons.

The defendant appealed to the Federal Court against the above Judgment.

FEDERAL COURT.

V.K. Palasuntharam (*S. Periasamy* with him) for the appellants.

Raja Abdul Aziz Addruse (*Peter S.S. Yip* with him) for the respondent.

Cur. Adv. Vult.

Salleh Abas C.J. (Malaya) (delivering the Judgment of the Court): This is an appeal from the judgment of Datuk Wan Hamzah J. given on April 6, 1982 arising out of the respondents' Originating Summons asking for certain declarations and ancillary orders. The points at issue are these: Principally, whether an agreement dated September 19, 1980 by which the respondents agreed to sell and the appellants to buy a certain immoveable property known as Sharidal Complex was, as contended by the respondents, aborted, i.e. became void on April 30, 1982, through no fault of anyone, or as contended by the appellants is still subsisting entitling them to a specific performance. Alternatively, if the agreement did not become void on that date, whether the respondents were discharged from further performance thereof because of the failure by the appellants to pay the balance of the purchase price within the stipulated time, therefore entitling the respondents to forfeit the deposit paid thereunder. The learned judge held both the principal and the alternative issues in favour of the respondents and made a number of consequential orders based on the principal issue.

The facts are as follows: The respondents agreed to sell to the appellants the property concerned for a total price of $8,500,000.00 and clause 1 of the agreement provided that in consideration of a sum of $850,000.00 paid by the appellants as deposit the respondents agreed to sell the aforesaid property for the price "free from all encumbrances but subject to the existing leases and tenancies and subject to the conditions of title whether express or implied affecting the same and subject to the terms and conditions hereinafter contained." The relevant terms and conditions for the purpose of this appeal are clauses 2, 3, 4 and 13, which are as follows:

"2. Immediately upon the execution of this Agreement thereafter –

(a) the Vendor shall execute a valid and registrable Memorandum of Transfer in favour of the Purchaser and/or its nominee or nominees and cause its solicitors to present the same to the Collector of Stamp Duties;

(b) the Purchaser or its Solicitors shall make an application to the Foreign Investment Committee for due approval by the said Foreign Investment Committee of the sale and purchase hereunder; the Vendor shall render all possible assistance and provide such details as are necessary for such application and provided always all monies paid by the Purchaser hereunder shall be returned to the Purchaser in the event that such approval as aforesaid is not given by the Foreign Investment Committee.

3.(i) The Purchaser shall complete the purchase within fourteen (14) days after obtaining the approval from the Foreign Investment Committee as aforesaid or within three (3) months after the date of application to the Foreign Investment Committee as aforesaid pursuant to Clause 3 hereof, whichever is the later, by paying to the Vendor's solicitors, MESSRS TAN SRI ABDUL AZIZ & CO. of No. 27, Jalan Gereja, Kuala Lumpur the balance of the purchase price amounting to MALAYSIAN RINGGIT SEVEN MILLION SIX HUNDRED AND FIFTY THOUSAND (M$7,650,000/–) out of which the said Vendor's Solicitors shall –

(a) pay such sum as may be necessary to MALAYAN BANKING BERHAD and BANK BUMIPUTRA MALAYSIA BERHAD to obtain the relevant discharges of the said charges and the documents of title;

(b) retain the sum of MALAYSIAN RINGGIT ONE HUNDRED FIFTY THOUSAND (M$150,000/–) for the purpose of Real Property Gains Tax Act 1976;

(c) hand over possession of the said Property to the Purchaser; and

(d) thereafter deliver to the Purchaser a valid and registrable Memorandum of Transfer of the said Property in favour of the Purchaser or his nominee together with the document of title thereto, the relevant discharges of the said charges and all such other document or documents necessary to effect registration of the said Transfer.

(ii) Upon receipt of the document referred to in Paragraph 3(i)(d) above and upon the receiving of a notification from the Collector of Stamp Duties on the amount of stamp duty payable, the Purchaser or its Solicitors shall immediately and in any event not later than seven (7) days after the receipt of such notification from the Collector of Stamp Duties as aforesaid, present the Memorandum of Transfer and other relevant documents for registration.

4. If the Purchaser shall fail to pay the balance of the purchase price in accordance with the provisions of clause 3 hereof it shall be lawful for the Vendor to determine this Agreement at any time thereafter and the deposit paid under clause 1 hereof shall be forfeited to the Vendor absolutely by way of agreed liquidated damages and thereafter this Agreement shall cease to have any effect whatsoever.

.....

13. Time wherever mentioned in this Agreement shall be of the essence of the contract."

After the agreement was signed the respondents requested the appellants to release the balance of the purchase price amounting to $7,650,000.00 in advance of the stipulated time on condition that it would be refunded if the Foreign Investment Committee (FIC) would not approve the deal. The appellants agreed to the proposal but imposed a condition that the respondent's undertaking to refund the sum must be covered by a bank guarantee. This requirement was not acceptable to the respondents and so nothing came out of it. Subsequently at the request of the respondents and in return for the delivery of a Memorandum of Transfer relating to the sale of this property in favour of the appellants, on December 17, 1980 the appellants sent a cheque for $500,000.00 being an advance payment for the property on condition that it would be refunded should the FIC refuse to approve the deal.

The appellants applied for the FIC's approval for the transaction on November 28, 1980. The respondents themselves wrote a letter on February 16, 1981 to the FIC in connection with the proposed sale and received in reply thereto the FIC's letter dated February 25, 1981 in which it stated that it would not agree to the deal as it would reduce Bumiputra ownership of immoveable properties and that it therefore requested the respondents to reconsider their proposal. Presumably because of this letter the respondents subsequently suggested to the appellants a different method of effecting the transfer of Sharidal Complex in that instead of the property being transferred to the appellants, the latter should take over the company called Sharidal Jaya, which owns the property and the price of the takeover was $10.5 million. This proposal was not acceptable to the appellants. The respondents next wrote on March 18, 1981 to the appellants stating that in the light of the said FIC's letter "the agreement has determined in accordance with clause 2(b) of the Sale & Purchase Agreement." (KRS-21 at p.97 of the Record). In their letter dated March 24, 1981, the respondents repeated their view and offered to refund to the appellants all sums paid under the agreement in accordance with clause 2(b) of the agreement and also to compensate them for "all reasonable expenses incurred todate." (KRS–24, p.100 of Record). The reply from the appellants was that they were still waiting for the decision of the FIC and that in their view the agreement was still in force.

Finally, the FIC made its decision and conveyed it to the appellants by its letter dated April 30, 1981 (KRS-27, p.103-104 of Record). In this letter the FIC expressed its objection to the proposal as it stood but went on to say that it would agree to the sale if it was to a joint-venture company of which at least 30% of its equity is held by Bumiputras. As a result of this decision the respondents sent another letter dated May 6, 1981 (KRS-28, p.105 of Record) to the appellants reiterating their previous stand and offering to refund the sum of $1.35 million previously paid to them. The appellants did not reply to this letter, but they did write on May 22, 1981 to the FIC appealing to it to reconsider its decision. (KRS-29, p.106 of Record). On July 8, 1981 the FIC replied reaffirming its view in its earlier letter.

Since the deal would only meet the approval of the FIC if the sale was to a joint-venture company with specified equity structure, taking advantage of clause 2(a) of the Agreement which says that the property may be transferred to the appellants' nominee or nominees, on July 20, 1981 pending the incorporation of such company the appellants wrote to the respondents to complete the sale by delivering to them another signed Memorandum of Transfer by leaving the transferee's name blank as it was yet to be incorporated. Under cover of this letter the appellants also forwarded a cheque for a sum of $7,150,000.00 being the balance of the purchase price. (KRS-31, pp.109-110 of Record). The respondents refused to accept the cheque and to sign the required Memorandum of Transfer. Repeating their earlier stand they went on further to say that even if the agreement was not aborted, as the appellants

claimed, the agreement was terminated under clause 4 because the appellants did not pay the balance within the time stipulated under clause 3(1) of the agreement and that the deposit would therefore be forfeited. (KRS-33, p.112 of Record). The respondents confirmed this alternative stand in their letter dated July 27, 1981, (KRS-35, p.114 of Record), and by another letter dated August 27, 1981 (KRS–37, p.117 of Record) they returned to the appellants the $500,000.00 which they earlier received as advance payment for the purchase price, but retained the deposit of $850,000.00 presumably because of the stand taken by the appellants. The appellants denied that they were outside the stipulated time when they tendered the balance of the purchase price contending that the time should be calculated from the date of FIC's second letter, i.e. July 8, 1981 and not from the date of its first letter, i.e. April 30, 1981. They insisted that the agreement was still subsisting and asked the respondents to transfer the property to a blank purchaser. (KRS-38, p.119 of Record).

Meanwhile the appellants took steps to incorporate a company to take the transfer of the property as required by the FIC. Eventually, a company known as Nalfin Realties Sdn. Bhd. was incorporated on September 8, 1981 (KRS-46, p.130 of Record). On October 6, 1981 it passed two resolutions: one resolution to acquire the property concerned and the other to allocate 30% of its shares to Bumiputras. (KRS-47 & 48, pp.131 & 132 of Record). Attempts were made by the appellants to get the respondents and a Malay Officers' Co-operative Society (MOCCIS) to subscribe to the 30% shares of the company. But there was no response from both of them and it would thus appear that Nalfin Realties Sdn. Bhd. is still a wholly owned subsidiary of the appellants. (KRS-49, p.133 of the Record).

Eventually on October 31, 1981 the respondents filed an Originating Summons (O.S.F. 726/81) asking for a declaration that the agreement became void on April 30, 1981 because the FIC did not give the required approval or alternatively that the respondents were discharged from their liability under the agreement because the appellants did not tender the balance of the purchase price within the stipulated time.

The principal issue – whether the agreement became void on April 30, 1981:

It is the contention of the respondents that the agreement became void on April 30, 1981 because the FIC's letter of that date refuses to approve the sale of Sharidal Complex to the appellants. The appellants, on the other hand, maintained that the agreement did not become void but still subsists because the FIC's letter was not an absolute rejection of the deal but a conditional approval. An appeal by the appellants to the FIC to change its decision to an absolute approval was not successful as the FIC by its letter dated July 8, 1981 (KRS-30, p. 108 of Record) reaffirmed its earlier letter. Since the divergence of views taken by the parties hinges upon the FIC's decision, it is necessary for us to reproduce the contents of these two letters. These are:

(1) The letter dated April 30, 1981 (KRS-27, p.103 of Record) is as follows:

"Bilangan Surat Kita: (26) dlm. BPE 3/1/798

UNIT PERANCANG EKONOMI,
JABATAN PERDANA MENTERI,
KUALA LUMPUR 11-01,
MALAYSIA

April 30, 1981.

D.P. Vijandran Associates,
5th Floor, Wisma Yakin,
Jalan Masjid India,
Kuala Lumpur.

Tuan,

Proposed purchase of Sharidal Complex by National Land Finance Co-operative Society Ltd. from Sharidal Sdn. Bhd.

I refer to the application for approval of the Foreign Investment Committee (FIC) regarding the above proposal and write to inform you that the FIC has considered the application and noted that by an Agreement dated September 19, 1980, between National Land Finance Co-operative Society Ltd (NLFC) and Sharidal Sdn. Bhd. (Sharidal), NLFC proposes to purchase from Sharidal a piece of land measuring 8,672 sq. ft and held under Q.T. (R) 4859, Lot 170, section 7, Town of Petaling Jaya, together with the building erected thereon known as Sharidal Complex, for a total consideration of $8.5 million.

I am directed to inform you that that the Foreign Investment Committee is not agreeable to the transaction to proceed as proposed. However, the FIC has no objection to the purchase of Sharidal Complex by National Land Finance Co-operative Society Ltd from Sharidal Sdn. Bhd. being undertaken on condition National Land Finance Co-operative Society Ltd. incorporates a joint-venture company with Bumiputra holding at least 30% of the company's equity to own the property, and NLFC obtaining the approval of the Director-General of Co-operative Development.

BERKHIDMAT UNTUK NEGARA.

Saya yang menurut perintah,

(Sgd. HAJI MOHD. KHALIL BIN HJ. MOHD. NOOR)
Setiausaha, Jawatankuasa Pelaburan Asing."

The letter dated July 8, 1981 (KRS-30, p.108 of Record) is as follows:

"Bilangan Surat Kita: (29) dlm. BPE 3/1/798

UNIT PERANCANG EKONOMI,
JABTAN PERDANA MENTERI,
KUALA LUMPUR 11-01
MALAYSIA

8hb Julai, 1981.

Pengerusi,
Syarikat Berkerjasama Kebangsaan
Pemodalan Tanah Bhd.,
Bangunan Tun Sambanthan,
No. 2, Jalan Sultan Sulaiman,
Peti Surat 2133,
Kuala Lumpur 01-02.

Tuan,

Pembelian Bangunan Sharidal oleh Syarikat Berkerjasama Kebangsaan Pemodalan Tanah Berhad.

Saya diarah merujuk kepada surat tuan bertarikh 22hb Mei, 1981, yang merayu agar Jawatankuasa Pelaburan Asing mengecualikan Syarikat Berkerjasama Kebangsaan Pemodalan Tanah Bhd. daripada dasarnya dan membenar ia membeli Bangunan Sharidal tanpa dikenakan apa-apa syarat.

Dengan dukacitanya dimaklumkan di sini bahawa Jawatankuasa Pelaburan Asing tidak dapat melayankan rayuan tersebut. Oleh yang demikian, pembelian harta tersebut hendaklah dilakukan oleh sebuah syarikat usahasama yang mempunyai sekurang-kurangnya 30% penyertaan ekuiti Bumiputra dan Syarikat Berkerjasama Kebangsaan Pemodalan Tanah Bhd. mestilah juga mendapat kebenaran dari Ketua Pengarah Pembangunan Koperasi mengenai pembelian itu.

BERKHIDMAT UNTUK NEGARA.

Saya yang menurut perintah,

(Sgd. HAJI MOHD. KHALIL BIN HJ. MOHD. NOOR)
Setiausaha,
Jawatankuasa Pelaburan Asing."

In our judgment it would be a strain on the language if we were to agree with the appellants' view that the FIC approved the proposed sale. We agree with the learned judge's view that the FIC's letter "was a rejection of the Defendants" (appellants') application for approval of the sale and purchase." In our judgment too it is clear that as proposed, the transaction was objectionable to the FIC. For the appellants to argue that the letter gave them the required approval they must show to our satisfaction that the transfer of the property as required by the FIC to a joint-venture company with 30% Malay holding was within the contemplation of the parties when they signed the agreement on September 19, 1980. It if was not, the condition imposed by the FIC, i.e. transfer to a joint-venture company could not be held to be an approval and the agreement must be amended with the consent of the respondents before the terms imposed by the FIC could be implemented and if the respondents refused to agree, as they did in this case, there is no use saying that the FIC's letters gave an approval and that the agreement was still subsisting and that therefore the respondents must complete the deal. It is true that under clause 2(a) of the agreement, the respondents are required to execute a memorandum of transfer in favour of the appellants and/or their nominee or nominees but we are of the view that the intention of the parties was that the transfer was only confined to a nominee or nominees which was or were in esse at the time of the agreement. If they had intended to include a nominee or nominees which was or were to be brought into existence in the future, they would have said so in that clause. In our judgment it is therefore plain that they never thought of any nominee or nominees which was or were to be created in the future. The argument about the transfer to a would-be-created nominee or nominees is simply put forward in order to bring the agreement within the terms of the FIC's letters. In our judgment too even if the FIC's letters are construed as conveying a conditional approval, it is still not an approval within the meaning of clause 2(a) of the agreement.

What then is the effect upon the agreement of the non-approval by the FIC? Clause 2(b) of the agreement which deals with this matter is silent as to whether the agreement would be valid or not, but it does contain a proviso that "all monies paid by the purchaser hereunder shall be returned to the purchaser in the event that such approval as aforesaid is not given by the Foreign Investment Committee." Thus, if the appellants are required to refund the deposit it goes without saying that in the event the appellants need not have to pay the balance and that the respondents need not have to comply with the provisions of clause 3 of the agreement, i.e. to complete it. In other words, the parties are under no obligation to complete the transaction

and the agreement may be then regarded as void or abandoned or to use the respondents' expression "aborted".

It is also clear from a number of letters that passed between the parties and their solicitors that their understanding of the agreement was that further performance of it after payment of the deposit simply hangs upon the decision of the FIC over which neither party was in control. For example in a letter dated December 1, 1980 relating to the respondents' request to release the balance of the purchase price amounting to $7,650,000.00 their solicitors gave an undertaking to the appellants' solicitors that the respondents would –

"refund the said sum of $7,650,000/– to your client in the event that the transfer of the said property cannot be registered in favour of your client or is not approved by the Foreign Investment Committee."
(KRS-3, p.72 of Record)

The reply by the appellants' solicitors underscored the same understanding. In their letter dated December 3, 1980 they required the respondents to –

"provide our clients with a suitable bank guarantee to refund the full purchase price in the event that the approval of the Foreign Investment Committee for the sale and purchase is not granted and the transfer cannot be registered in favour of our clients."
(KRS-4, pp.74-75 of Record)

Even in their own letter to their solicitors dated December 16, 1980 relating to the release of this sum, the appellants instructed them to obtain –

"an undertaking to refund the entire sum by Sharidal Sdn. Bhd. in the event that F.I.C.'s approval is not forthcoming."
(KRS-9, p.80 of Record)

A similar letter was written by the appellants' solicitors on December 17, 1980 regarding the payment of $500,000.00 as advance payment for the balance to the effect that the money would be refunded –

"in the event that the sale and purchase does not go through for any reason whatsoever together with normal bank interest due thereon."
(KRS-12, pp.84-85 of Record)

It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled. (See *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.*[1] – per Denning, L.J. – and *Property and Bloodstock Ltd.* v. *Emerton; Bush* v. *Property and Bloodstock Ltd.*[2] – per Sachs, L.J. Until the FIC approval was given liability for further performance remained unenforceable, i.e. suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is in effect laid down by section 33(a) of the Contracts Act which enacts –

"33.(a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened."

As the approval in this case was refused it means that contingent event becomes impossible and the agreement therefore becomes void in accordance with section 33(b) of the Contracts Act, which is as follows:

"33.(b) If the event becomes impossible, such contracts become void."

We draw much support from *Aberfoyle Plantations Ltd.* v. *Khaw Bian Cheng*[3] which we think is on all fours with the case under the present appeal; the only difference being that in *Aberfoyle's* case the parties expressly agreed that in the event of the non-fulfilment not only was the purchaser entitled to the refund of the deposit but that the agreement itself would become null and void. Whereas in the case under the present appeal the parties made no reference at all to the voidness or nullity of the agreement. This silence, in our view, is of no consequence because it is implicit that the validity or otherwise of the agreement depends entirely upon the general principle of the law of contract relating to the nature and effect of this sort of stipulation.

Although many judges dislike the use of the word "condition" because the word is susceptible to a number of senses in which it can be used, authorities have nevertheless established that

there are at least two senses in which the word is used. First, it is used in the sense of a condition as opposed to a warranty. Secondly, it is used in the sense of a contingent condition (precedent or subsequent) as opposed to a promissory condition. (See *Anson's Law of Contract,* 24th ed. pp.130-134). In so far as this appeal is concerned, we are not concerned with the first sense but only with the second meaning. The question is therefore whether the requirement as to FIC approval for completion of the proposed sale is a contingent condition or a promissory condition. A contingent condition, as we have already referred it, is a provision in a contract to the effect that the contract shall not take effect unless and until the condition is fulfilled, and the non-fulfilment of the condition does not render either party liable in damages to the other; whilst a promissory condition, on the other hand, is an essential term of the contract, the breach of which entitles the innocent party to break itself as discharged from the contract and to sue for damages.

In *Aberfoyle's* case *(supra)* a condition in a sale agreement that the completion of the sale of the land was conditional upon the vendor obtaining the renewal of the lease which was the subject matter of the sale from the State Government was held by their Lordships of the Privy Council to be a contingent condition and not a promissory condition. We confess we cannot see any difference between this condition and the requirement for FIC approval in the case under the present appeal. To us the requirement belongs to the category of contingent conditions the non-fulfilment of which negates the existence of any contractual relationship between the parties to complete the agreement.

In the case of *Property and Bloodstock Ltd. (supra),* however, the Court of Appeal in England as regards somewhat similar condition reached a different conclusion. In that case a sale agreement between the vendor and the purchaser was made subject to the vendor obtaining the consent of the landlord to the assignment of the lease, which was the subject matter of the sale to the purchaser. Two members of the Court of Appeal (Danckwerts L.J. and Sachs L.J.) held that such stipulation was not a contingent condition in the sense of *Aberfoyle's (supra)* condition, but only a matter of title in the sense of "the machinery for carrying out the contract", (per Sachs L.J. at p.330F). Because of its close similarity with condition 10(5) of the National Conditions of Sale, which is "commonly regarded (in conveyancing practice) as no more than a term of the contract relating to title" the requirement as to the consent of the landlord was held to be outside the category of *Aberfoyle's* type of condition, though there was undoubtedly a similarity with the latter (pp. 329 A-B and 331 C-E). Sellers L.J., the third member of the court, on the other hand whilst agreeing with the conclusion reached by the other hand two members, confessed that he could not see any difference between the condition in *Aberfoyle's* case and that in the case which the court was called upon to decide.

However, be that as it may, a number of factors were listed out by Danckwerts, L.J. to show how the *Aberfoyle's* case was inapplicable. First, the vendor was a mortgagee who exercised his power of sale because the mortgaging lessee had defaulted in paying the principal sum secured by the mortgage of the leasehold property, the subject matter of the sale. The question which the court had to decide there was whether the vendor (mortgagee) could be prevented from completing the sale by the mortgaging lessee by the tender of the redemption money. The court held no. Secondly, the vendor and the purchaser were both willing and looking forward to the completion of the sale. This is not the situation in *Aberfoyle's* case, because in that case the parties were in conflict and the purchaser wished to get out of the contract. Similarly, in the present appeal the situation is the same as that in *Aberfoyle's* case except that instead of the purchasers (the appellants) who want to get out of the contract it is the vendors (the respondents) who wish to do so. Thirdly, it was common ground between the parties that the landlord's consent would be obtained. But note that in the present case the parties are at variance as regards the effect of the FIC letter. His Lordship Danckwerts, L.J. besides holding that the requirement as to the landlord's consent was no more than a mere term of the contract also expressed a strong reservation as to the correctness of the judgment of the Privy Council in *Aberfoyle's* case.

However, even if we hold that the requirement as to FIC approval is no more than a term – essential term of the agreement, the result would still be the same. If it is a mere term of the contract the non-approval by FIC of the deal certainly defeats the sale because such an approval would then constitute a supervening event rendering the contract void under section 57(2) of the Contracts Act. This view was in fact expressed

by Lord Danckwerts in *Property & Bloodstock's* case *(supra)* when he said:

"Of course, if the necessary consent by the landlords to the assignment cannot be obtained, it defeats the sale, but this is a supervening event."
(p.329C)

Thus in so far as the principal issue is concerned whether we hold the requirement as to FIC approval is a contingent condition as in *Aberfoyle's* case or as a mere promissory condition – i.e. mere term of the agreement as in *Property and Bloodstock's* case *(supra)* the result would not be different. In the first case there was no agreement to enforce until the requirement was satisfied and the deposit was returnable under the provision of the agreement itself as there was no ground for withholding it any longer; whereas in the second case although there was a subsisting contract, it was, however, defeated or frustrated by a supervening event, which is the non-fulfilment of the requirement, and in this case also the deposit was refundable as money held and received for the use of the appellants who paid it (see section 15(2) of Civil Law Act).

The alternative issue – Whether the respondents were discharged from further liability by the failure of appellants to pay the balance within the stipulated time?

Practically the whole brunt of Mr. Palasuntharam's submission on behalf of the appellants was directed to this issue. He urged us to agree with him that the time for the payment must be calculated, not from April 30, 1981, the date when the FIC conveyed its decision on the appellants' application, but from July 8, 1981, the date on which the FIC gave its decision on the appellants' appeal. He said that until the decision on July 8, 1981 was made, the decision conveyed on April 30, 1981 was not the decision. Consequently, he submitted that the tender of payment on July 20, 1981 was within the stipulated time under clause 3(a) of the agreement and the appellants therefore did not commit any breach of clause 4 of the agreement which would have resulted in the forfeiture of the deposit. There was also a submission that even if the period within which the balance had to be paid were calculated from April 30, 1981, the conduct of the parties regarding the payment of an advance of $500,000.00 constituted a waiver of clause 13 of the agreement, thus rendering time no longer of the essence of the contract and that there being no notice given to restore time to be of the essence of the contract the delay in sending the balance was not a default under clause 4 of the agreement.

With respect, we do not think that we should deal with this submission at all, because this alternative issue would only arise and become relevant if the FIC had approved the deal and the agreement would have subsisted. As we have already held that the agreement was rendered void by the FIC's non-approval, irrespective of the date when it became void – either on April 30, 1981 or July 8, 1981 – the alternative issue is irrelevant and we therefore refrain ourselves from indulging in it.

Procedural objections:

Counsel for the appellants objected to the respondents taking the proceedings by an Originating Summons instead of by a writ. He argued that there are matters of credibility of witnesses and issues of facts which could only be decided by oral evidence instead of by sworn affidavits. With respect, we disagree with the submission. The issue involved in this case is purely a matter of construction of the sale and purchase agreement between the parties. No other evidence is needed to determine the issue than the massive correspondence that passed between them and their solicitors. We think that the learned judge was right in holding that the issue can be decided on the basis of the documents exhibited in court together with the undisputed facts disclosed and that there are no issues relevant to the case which require evidence to be called at a trial. We would further add that there is nothing to prevent the appellants from cross-examining Haji Ahmad Roose bin Haji Mohd Ali if they were not happy with his affidavits. In this case the appellants surely had the opportunity to cross-examine him, but they did not avail themselves of it and let this opportunity to pass by. We are therefore of the view that the procedural objection raised by the appellants had no substance.

Conclusion:

In conclusion for reasons given above we dismiss the appeal and hold that the agreement became void on April 30, 1981 because of the refusal of the FIC to approve the deal over which neither the appellants nor the respondents have control and that the various consequential orders made by the learned judge based on the above ruling are therefore valid and are hereby affirmed.

The respondents are entitled to the costs of the appeal and the deposit of $500.00 lodged in court in connection with the appeal must be paid to them on account of taxed costs.

Appeal dismissed.

Solicitors: *Nahappan, Peri & Partners; Abdul Aziz, Ong & Co.*

PUBLIC PROSECUTOR v. NORDIN BIN JOHAN & ANOR.

[F.C. (Raja Azlan Shah L.P., Abdul Hamid & Abdoolcader F.JJ.) June 7 to 9, 1983]

[Kuala Lumpur – Federal Court Criminal Appeal No. 2 of 1983]

Criminal Law & Procedure – Charge of murder – Common intention – Accused acquitted by trial judge at end of prosecution case – Appeal on ground that trial judge drew wrong inferences from facts – Whether trial judge in security case bound to call on defence at end of prosecution case – Statement by co-accused – May be taken into consideration but there must some other cogent evidence – Question of fact – Approach of appellate court – Evidence Act, 1950, s. 30 – Penal Code, s. 34.

Evidence – Statement by co-accused – May be taken into consideration against accused but there must be some other cogent evidence – Evidence Act, 1950, s. 30.

In this case the respondents were jointly charged with some other persons for murder. The respondents were acquitted by the trial judge at the end of the prosecution case. The Public Prosecutor appealed and it was argued (a) that the learned trial judge had drawn wrong inferences from the facts as found and accepted by him; (b) that the provisions of the Essential (Security Cases) Regulations, 1975 mandatorily require the defence to be called in every case when the prosecution case is closed, notwithstanding the absence of a *prima facie* case; (c) that the learned trial judge failed to give due weight to the statement of the co-accused in the case.

Held: (1) in a security case the court is not obliged at the end of the prosecution case to call on the accused to enter on his unless the prosecution has then proved a *prima facie* case against him;

(2) in this case the statement of the co-accused may be taken into consideration against the accused but the prerequisite to this is that there must be some cogent evidence against them quite apart from the statement of the co-accused;

(3) the nature of this evidence which would be extraneous to the confession of a co-accused and its qualitative and probative value in relation to the charge must be a factual matter in the context and circumstances of the particular case;

(4) the approach of an appellate court in a case like this is well established. In such a case it is its duty to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of the witnesses comes into question but with full liberty to draw its own inference from the facts proved or admitted and to decide accordingly;

(5) in this case on the basis of the facts which the learned judge had found and accepted, his decision was one which any reasonable tribunal properly directed could have reached;

(6) the evidence against the respondents in this case, apart from the confession of the co-accused, was not sufficient to satisfy the requirements of the charge against them and calling on their defence would not only go beyond taking into consideration the co-accused's statement but be tantamount to virtually relying on it to an extent that would not be permissible for the purposes of section 30 of the Evidence Act 1950.

Case referred to:

(1) *Public Prosecutor* v. *Sihabduin* [1980] 2 M.L.J. 273.

FEDERAL COURT.

Tan Sri Abu Talib bin Othman, Attorney-General (*Lim Beng Choon,* Senior Federal Counsel and *T. S. Sambanthamurthi,* Senior Federal Counsel with him) for the appellant.

Sri Ram (*V. Balasingam* and *Zulkifly Rafique* with him) for respondent No. 1.

James Ponniah for respondent No. 2.

Cur. Adv. Vult.

Raja Azlan Shah L.P. (delivering the Judgment of the Court): An elaborate argument has been addressed to us by the Public Prosecutor on one vital point which is said to afford a ground for impugning the decision of the learned trial judge, the point being that he drew wrong inferences from the facts as found and accepted by him.

We have been urged by the Public Prosecutor in this appeal against the acquittal of the 2 respondents to review and disapprove the decision of this court in *Public Prosecutor* v. *Sihabduin*[1] which held by majority that in a security case at the end of the prosecution case the court is not obliged to call on the accused to enter on his defence unless the prosecution has then proved a *prima facie* case against him, and to hold that the provisions of the Essential (Security Cases) Regulations, 1975 mandatorily require the defence to be called in every case when the prosecution case is closed, notwithstanding the absence of a